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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. ...545

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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TABLE OF CONTENTS.

	Page
Prayer	1
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statute and Regulations Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	12
Appendices:	
A. Opinion of the District Court	13
B. Opinion of the United States Court of Appeals for the Seventh Circuit	25
C. Statute Involved	34
D. Regulations Involved	36

TABLE OF AUTHORITIES.

Cases:

United States v. Chicago, B. & Q. R. Co., 237 U. S. 410 (1915)	9
United States v. Erie Railroad Company, 237 U. S. 402 (1915)	10
United States v. Northern Pacific Railway Company, 254 U. S. 251 (1920)	10
United States v. Seaboard Air Line Railroad Company, 258 F. 2d 262 (C. A. 412, 1958)	10

United States v. South Buffalo R. Co., 168 F. 2d 948 (C. C. A. 2nd, 1948) (Cert. Den. 335 U. S. 870 (1948)) 10

Statute:

Power or Train Brakes Safety Appliance Act, 45 U. S. C., Sec. 9 2

Other:

49 C. F. R., Sec. 132.12 2
49 C. F. R., Sec. 132.13 (e) (1) 2, 5, 7, 8
49 C. F. R., Sec. 132.13 (e) (1) 2, 5, 8, 9, 12

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To the United States Court of Appeals for the Seventh Circuit.

Petitioner, Terminal Railroad Association of St. Louis (TRRA), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 2, 1968. The certified record has been filed with the Clerk of the Court with this petition.[1]

[1] The appendix to the brief submitted by the respondent in the Court below has been certified as the record for use with this petition. The pages have not been renumbered. "P. A." refers to plaintiff-appellant's appendix. "Appendix" refers to the appendix in this petition. The certified record also includes the proceedings in the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The memorandum and order of the District Court filed May 24, 1967, set forth at P. A. 41-53, is not reported. The opinion of the Court of Appeals for the Seventh Circuit, set forth in Appendix A hereto, is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 2, 1968. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

Whether a through train which is delivered by a trunk line carrier to a terminal carrier for handling by the terminal carrier for a distance of less than 20 miles to connect with another trunk line carrier, and not interchanged, is a transfer train for the purposes of Section 132.13 of the Power Brake Rules (49 CFR 132.13), requiring the brake test prescribed by 49 CFR 132.13 (e) (1).

STATUTE AND REGULATIONS INVOLVED.

Set forth in Appendix C hereto are Section 9 of the Safety Appliance Act (45 U. S. C., § 9) and Sections 132.12, 132.13 (c) (1) and 132.13 (e) (1) of the Power Brake Rules and regulations (49 C. F. R., §§ 132.12, 132.13 (c) (1) and 132.13 (e) (1).

STATEMENT OF THE CASE.

A fair and concise statement of the facts in this case as set forth in the opinion of the Court of Appeals is as follows (Appendix B, p. 25):

TRRA is a corporation, the stock of which is owned by several railroads serving the St. Louis gateway from the east and by others serving from the west. It owns a bridge over the Mississippi, and trackage and yards on both sides of the river, in St. Louis, Missouri, and East St. Louis, Illinois. It is principally a terminal and interchange facility for other railroads. The railroads which own stock have the right to use its tracks.

The parties agreed to treat each of two train movements as representative of several counts. The circumstances are not in dispute. The issue concerns the applicability of the regulations.

The New York Central movement. A train of 60 freight cars, hauled by a New York Central locomotive, and with a New York Central caboose attached, arrived over the New York Central from Indianapolis, at the legal boundary between the New York Central and TRRA tracks in East St. Louis. The New York Central crew left the train, and the TRRA crew boarded. There was no change of locomotive, caboose, or consist. The TRRA crew operated the train over TRRA tracks to Dupo, Illinois, a distance of about nine miles, for delivery to the Missouri Pacific. As far as waybills and accounting records were concerned, the transaction was treated as an interchange directly between New York Central and Missouri Pacific.

The government claims that the delivery of the train by the New York Central crew to the TRRA crew was an interchange within the meaning of sec. 132.12 and that TRRA was accordingly required to make the initial terminal road train air brake test. TRRA denies that this delivery constituted an "interchange", and contends no test was required. Clearly none would have been required if the New York

Central had remained in control of the train and operated it to Dupo.

The Missouri Pacific movement. A train of 123 freight cars, hauled by a Missouri Pacific locomotive, and with a Missouri Pacific caboose attached, arrived from Little Rock, Arkansas over the Missouri Pacific at the Missouri Pacific yards at Dupo, Illinois. The locomotive and caboose were removed, and a TRRA crew coupled on a TRRA locomotive and caboose. This crew made the type of air brake test required by sec. 132.13 (c) (1) "At a point other than initial terminal where locomotive or caboose is changed . . ." The train proceeded over TRRA tracks a distance of eight miles to a TRRA yard, where the cars were eventually delivered to the B. & O. and Pennsylvania railroads.

The government does not claim that the TRRA received this train in interchange, the alleged difference between this movement and the New York Central movement being the change of locomotive and caboose. It claims that this movement was a transfer train movement, making sec. 132.13 (e) (1) applicable, and that since the movement did not exceed 20 miles the initial terminal road train air brake test, pursuant to sec. 132.13 (e) (2), was not required, but the test prescribed by sec. 132.13 (e) (1) was. One of the differences between the (c) (1) test, actually performed, and the (e) (1) test is that in (c) (1) observation of the application and release of brakes on the rear car would suffice, while in (e) (1) it would be necessary to "walk the train", observing application on each car. The latter observation is one of the requirements of the initial terminal test, required for transfer train movements exceeding 20 miles and for trains received in interchange.

TRRA denies this was a transfer train movement. Had the Missouri Pacific crew remained in control,

changed engine and caboose, and operated the train to the TRRA yard, the only test required would have been the one prescribed by sec. 132.13 (c) (1), and it is conceded this test was made. TRRA contends it was required to do no more.

The District Court found TRRA not guilty of violating the provisions of the Safety Appliance Act. The Court of Appeals for the Seventh Circuit held that neither train movement involved an interchange within the meaning of the Power Brake Rules. However, the Court of Appeals found that both train movements were transfer train movements within the meaning of the Power Brake Rules requiring the test prescribed by sec. 132.13 (e) (1) ("walking the train"). TRRA had made the rear end brake test prescribed by sec. 132.13 (c) (1) on the Missouri Pacific train movement but did not perform the "walking the train" test required of transfer trains under sec. 132.13 (e) (1).

TRRA here seeks a review of the Court of Appeals decision which holds the train movements to be transfer train movements.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Seventh Circuit in holding that the train movements in question are transfer train movements requiring a "walking the train" test prescribed by section 132.13 (e) (1) of the Power Brake Rules has decided a Federal question in a way to conflict with the applicable decisions of this Court. The train movements in question were not transfer train movements and are completely distinguishable from transfer train movements as determined by the Supreme Court.

Further, the Court of Appeals in deciding that the movements in question are transfer train movements has created a new definition for transfer trains which conflicts

with the decisions of this Court, and with particular reference to the Missouri Pacific movement, conflicts with the Power Brake Rules promulgated pursuant to the Power Brake Law.

1. The railroad tracks of TRRA have been used merely to connect a through train movement between the New York Central lines and the Missouri Pacific lines at Dupo, Illinois, and between the Missouri Pacific lines and the B. & O. and Pennsylvania Railroads. In the New York Central movement the train originated at Indianapolis, Indiana to be delivered to the Missouri Pacific Railroad at Dupo, Illinois. Absolutely no switching, or assembling of cars took place on this train movement, once the train left Indiana and was received by Missouri Pacific Railroad at Dupo. In the Missouri Pacific movement, the train originated at Little Rock, Arkansas, for connection with the Pennsylvania Railroad and B. & O. Railroad. At Missouri Pacific's Dupo yards a TRRA locomotive and caboose were attached to the train in place of the Missouri Pacific locomotive and caboose. Again no assembling or switching of cars took place on this train movement once the train left Little Rock, Arkansas.

The Court below found that the two movements in question were not interchanged between TRRA and the trunk lines but that the interchange was between the trunk line carriers. TRRA agrees with the Court's ruling on the matter of interchange.

However, the Seventh Circuit did err in holding that the movements in question were transfer train movements. By so holding, the Seventh Circuit would require TRRA to make a brake test which it is not required to make under the Power Brake Rules.

In the New York Central movement, a TRRA crew was simply substituted for a New York Central crew in the connection between the New York Central and Missouri

Pacific. It is to be noted that the Seventh Circuit acknowledged that if there were no crew change between the New York Central and TRRA, absolutely no brake test would be required (Appendix B, p. 25).

In the Missouri Pacific movement, only a caboose and locomotive are changed on the Missouri Pacific's property at Dupo, Illinois, on the movement originating at Little Rock, Arkansas, hence at a point other than an initial terminal. Section 132.13 (c) (1) of the Power Brake Rules requires only the rear end car test "at a point other than initial terminal where locomotive or caboose is changed . . ." Again, the Court of Appeals acknowledges that no other test would be required if the change of the caboose and locomotive had been made by the Missouri Pacific crew (Appendix B, p. 27).

TRRA made the rear end test on the Missouri Pacific movement which, according to the exact language of sec. 132.13 (c) (1), is all that it is required to do. The facts of this case fit identically into the type of brake test performed and required to be performed by TRRA in the Missouri Pacific movement. The Power Brake Rules make no fine distinction as to who employs the train crew or owns the locomotives and cabooses.

Thus having found that no interchange took place in either of the movements, the Seventh Circuit should have found that the rear end test performed by TRRA in the Missouri Pacific movement was identical to that required under sec. 132.13 (c) (1) of the Power Brake Rules, since only a caboose and locomotive were changed at a point other than the initial terminal.

The fact that neither the New York Central nor Missouri Pacific movement was as a matter of law a transfer train will hereinafter be established. Insofar as the New York Central movement is concerned, there is absolutely nothing in the Power Brake Law or the rules promulgated

thereunder which requires TRRA to make any brake test on a through train movement which is not a transfer train, and where, as found by the Court, no interchange has taken place. The Seventh Circuit, therefore, has erred in holding that the TRRA is required to make any brake test in the New York Central movement and requiring TRRA to make a test in the Missouri Pacific movement different from that prescribed by section 132.13 (c) (1) of the Power Brake Rules where a caboose and locomotive have been changed at a point other than the initial terminal. The decision of the Circuit Court which requires TRRA to make the "walking the train" test required on transfer trains under sec. 132.13 (e) (1) when, in the New York Central movement, no test is required and in the case of the Missouri Pacific movement the rear end test of 132.13 (c) (1) is only required, places a burden upon TRRA not required by law.

2. Neither the Missouri Pacific nor the New York Central movement is a transfer train movement, but by so holding, the Seventh Circuit's opinion conflicts with prior decisions of this Court. Emphasis is given to the fact that both train movements were through movements without interchange involvement of TRRA as specifically found by the Seventh Circuit. In neither case involving TRRA was there any assembling or switching of cars. The only changes made in the complete train make-up occurred in the Missouri Pacific movement where a caboose and locomotive were changed at the Dupo yards, which is a point other than the initial terminal.

Each day, in the course of its operations, TRRA assembles many trains in its yards for delivery to various trunk lines in the area. These trains are made up of cars which have been interchanged to Terminal by an inbound carrier. TRRA switching crews assemble these cars into trains and deliver them to an outbound carrier. These

trains are known as "transfer trains", and before moving them, the TRRA crews "walk the train", i. e., they make the brake test prescribed by 49 CFR 132.13 (e) (1).

The distinction between a transfer train and the complete, through Missouri Pacific and New York Central movements is clear. The trains involved were complete, through trains moving from an initial terminal where the trains were made up to an ultimate destination point as contrasted with the transfer of cars from a switching, assembling or classification yard for delivery to another such yard to ultimately make up the complete, through train.

Inasmuch as there was no assembling, switching or breaking of the cars prior to or after their handling by TRRA, neither the Missouri Pacific nor the New York Central train was a transfer train.

A transfer train is one in which cars are received in a train yard, switched and assembled into a train and then transferred to another yard. A transfer train is in effect a temporary grouping of cars which will eventually be made up into a road train.

In **United States v. Chicago, B. & Q. R. Co.**, 237 U. S. 410 (1915) this Court considered the question of whether the Safety Appliance Act applied to transfer trains. In defining transfer train operations, this Court stated that the yards of the defendant railroad were ". . . used for receiving and breaking up incoming trains, assembling and starting outgoing trains, and assorting, storing, and distributing cars. To reach their ultimate destinations, whether on defendant's road or on those of other carriers, a large proportion of the cars have to be moved from one yard to the other and this is accomplished by transfer trains which are run over the mainline track connecting the yards. These trains usually consist of an engine and approximately thirty-five cars, are operated by what are

termed yard or switching crews, and carry no caboose or markers . . ." l. c. 411, 412.

In **United States v. Erie Railroad Company,** 237 U. S. 402 (1915), in applying the Safety Appliance Act to transfer trains, this Court referred to transfer trains which were defined as trains which ". . . usually have about twenty-five cars, do not carry a caboose, are drawn and operated by engines and crews specially engaged in that service, and have flags and signal lights differing somewhat from those on other trains, but answering the same purpose. They are not run according to fixed schedules, but at irregular intervals under the orders of yard masters and according to block signals . . ." l. c. 404, 405.

The concurring opinion of Circuit Judge Sobeloff in **United States v. Seaboard Air Line Railroad Company,** 258 F. 2d 262, 268 (C. A. 4th, 1958), pointed out that the Supreme Court's definition of transfer train in the Erie Railroad case referred to "temporary groupings of cars" moving to and from freight yards following the break up of trains bound in a certain direction and prior to the assembly of trains moving in another direction.

United States v. Northern Pacific Railway Company, 254 U. S. 251 (1920) also considered transfer trains as movements of cars to be assembled, switched or classified.

In **United States v. South Buffalo R. Co.,** 168 F. 2d 948 (C. C. A. 2nd, 1948) (Cert. Den., 335 U. S. 870 (1948)), Circuit Judge Augustus Hand, speaking for the Court, stated l. c. 951:

> "In the present case fifteen cars which had been assembled at one point were moved as a unit for about two miles to another point where they were to be broken up for further disposition without any cars being added or cut off over the route. We believe

that this is a transfer of cars from one switching point to another . . .'

From the foregoing decisions it is clear that a transfer train is nothing more than the movement of cars from one rail yard to another to be assembled into a through train, switched or classified. It is the transfer of temporary groupings of cars prior to their being classified and assembled into a complete train or after a through train has been broken up and the cars are being distributed to the rail yards. It is also obvious that neither the New York Central movement nor the Missouri Pacific movement is a transfer train. None of the elements which make up a transfer train operation is present in either the Missouri Pacific or New York Central movements. The New York Central move was a through train originating at Indianapolis, Indiana and delivered by a TRRA crew at Dupo, Illinois. There was no change of train consist and certainly no movement of a temporary grouping of cars which had been assembled or classified immediately prior to their handling by the TRRA crew. The same situation was true in the Missouri Pacific movement on the train originating at Little Rock, Arkansas for connection with the B. & O. and Pennsylvania Railroads. Again, this was no temporary grouping of cars which had been classified or assembled immediately prior to their handling by the TRRA crew. Neither was the handling by the TRRA crew of either movement for the purpose of delivering a temporary grouping of cars for assembling, switching or classification. The facts in the instant case clearly distinguish between the operations in the New York Central and Missouri Pacific movements and those involving transfer trains. As pointed out by the Court below, the New York Central and Missouri Pacific movements were complete, through train movements with interchange between the trunk line carriers, the New York Central and Missouri Pacific and the Missouri Pacific and B. & O. and Pennsylvania Railroads.

Since neither train was a transfer train, the Court of Appeals erred in holding that TRRA is required to make the "walking the train" brake test prescribed by Section 132.13 (e) (1) for transfer trains. This Court has established the definition of a transfer train. The Court of Appeals, in holding that the involved train movements are transfer trains when there is no transfer involved, has established a new definition for transfer trains which conflicts with that established by this Court. As a result of the decision of the Court of Appeals, TRRA would be required, in the Missouri Pacific movement, to make a brake test different from that required of it under the Power Brake Rules where no transfer train is involved and at a point other than at initial terminal where a locomotive and caboose are changed, and would be required to make a brake test in the New York Central movement where none is required under the Power Brake Rules. Writ of certiorari should therefore be granted to resolve the conflict.

CONCLUSION.

For the reasons herein contained, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

In the District Court of the United States
for the Eastern District of Illinois.

United States of America, Plaintiff, vs. Terminal Railroad Association of St. Louis, Defendant.	Civil No. 66-25 Civil No. 66-67 Civil No. 66-79 (Consolidated as Civil No. 66-25).

MEMORANDUM AND ORDER.

(Filed May 24, 1967.)

These three cases have been consolidated for hearing and are brought under the provisions of Title 45 U. S. C. A., Sections 1-16, inclusive, commonly referred to as the Safety Appliance Act.

Case No. 66-25 contains twenty causes of action; twelve charge violations of 49 CFR 132.13 (e) (1) and 49 CFR 132.12 and are in dispute.

Action No. 66-67 consists of five causes of action—one being admitted by the defendant, and the remaining four are in dispute and charge violations of 49 CFR 132.12.

Action 66-79 consists of one cause of action, a violation of 49 CFR 132.12.

49 CFR 132.12 provides in pertinent parts as follows:

> "All trains must be given inspection and test as specified by paragraphs (a) to (h) of this section at points: (1) Where a train is originally made up (In-

itial Terminal); (2) Where train consists is changed other than by adding or removing a solid block of cars and train brake system remains charged; (3) **Where train is received in interchange.**" (Emphasis supplied.)

49 CFR 132.13 provides that transfer trains in yard train movements not exceeding 20 miles must have the air brake hose coupled between all cars and after the brake system is charged to not less than 60 pounds a 15 pound service brake pipe reduction must be made to determine that the brakes are applied on each car.

The gravamen involves movements of New York Central trains to the lower yard in East St. Louis, Illinois, by New York Central crews which were then replaced by Terminal Railroad Association crews. In the one instance, the train continued to the Missouri Pacific or Frisco lines in St. Louis, Missouri, and in the other case continued to the Missouri Pacific yards in Dupo, Illinois. Another movement involved a train consist which was received by Terminal Railroad at Missouri Pacific's yard in Dupo, Illinois. There the locomotive and caboose of Missouri Pacific were cut off and replaced by TRRA locomotive and caboose. The TRRA crew made the brake test required by 49 C. F. R. 132.13 (c) (1). The train was then moved over TRRA tracks and delivered to the Pennsylvania and B. & O. railroads.

Generally stated, the facts surrounding the New York Central movements are as follows: The New York Central trains originate in Indianapolis, Indiana. The train is there given the full initial terminal brake test prescribed by 49 C. F. R. 132.12. It is then moved in a solid block destined for the Missouri Pacific yards or Frisco yards in St. Louis in one instance and the Missouri Pacific yards in Dupo, Illinois in the other instance. After the train is made up and the brake test made, it then

moves from Indianapolis, Indiana to Mattoon, Illinois, where a crew change occurs—the Indianapolis crew being replaced by a crew from Mattoon, both employees of the New York Central. No brake test is made, nor is any required. The train bound for St. Louis then proceeds to East St. Louis, and upon reaching the New York Central yard limits, the road crew is relieved and replaced by a yard crew, all New York Central employees. The train then proceeds to the TRRA rails in East St. Louis, where the New York Central crew is relieved by a TRRA crew and the train, remaining intact, proceeds to its destination in St. Louis. The New York Central road crew on the train movement from Indianapolis to the Missouri Pacific yards in Dupo is replaced at the TRRA rails by a TRRA crew which moves the train to Dupo.

In each instance the New York Central trains are made up in Indianapolis and are destined for either St. Louis or Dupo, Illinois. When a crew change is completed by New York Central crews, no test is made nor is one required. The government contends that when the crew change is from New York Central crew to TRRA crew then the power brake test prescribed by 49 CFR 132.12 is required; its position being that when the train crews are changed at the boundary lines between the New York Central and the TRRA, the train in question is received in interchange as that term is used in 49 CFR 132.12. The regulations do not define "interchange"; however, the government points to a definition of interchange as given in a declaratory order entered by the Interstate Commerce Commission on the 16th day of March, 1965. By this order the Commission held that when two railroads join in through-train operation without change of power, caboose, or other train consists, at their boundary, changing only crew at boundary, the boundary is the place where the train is received in interchange as that term is used in 49 CFR 132.12, because at that point the

use or haul on the line of one carrier ceases and the other commences.

Testimony established that in 1964 the New York Central began assembling entire trains in Indianapolis destined for St. Louis and Dupo to be delivered from Indianapolis to the destination by the New York Central crews, but that union rules required TRRA crews to move all movements on TRRA tracks and that it was thus necessary to change the crews from New York Central to TRRA personnel to meet the union requirements.

The question the court must determine with regard to the New York Central movements is whether or not an interchange did in fact occur when the New York Central crew was replaced by the TRRA crew—the entire consist of the train otherwise remaining intact.

In Southern Railway Co. v. Louisville and Nashville R. Co., 185 F. Supp. 645, the term "interchange" was defined. It was there stated:

> "Interchange occurs when a car passes from the account of one railroad into the account of another. Under Car Service Rule 7 interchange is accomplished only by the agreement of the carriers involved, and the L&N's Superintendent of Car Service notified the Southern's Superintendent of Car Service on July 20, 1954, that the Farmington Avenue location is not an interchange point between the L&N and Southern; and the L&N has never altered its position in this respect. Cars of L&N traffic destined to or from the General Mills plant stay in the account of the L&N and are not taken into the account of the Southern when Southern moves the cars through the switch from the L&N tract and into or out of the plant. The L&N continues to pay per diem rental on the cars all of the time that the

cars are in the General Mills plant, and it continues to be responsible for the safety of the cars, no interchange reports are executed, and General Mills maintains separate demurrage accounts with the L&N for its cars and the Southern for its cars."

The term "interchange" was also defined in Chicago & North Western Ry. Co. v. Chicago, R. I. & P. R. Co., 179 F. Supp. 33, wherein it was stated:

> "It is undisputed that the plaintiff and the defendant were both parties to the rules of the Association of American Railroads and that both had agreed to be bound by those rules. The defendant relies upon certain of those rules. Rule 7 of the Association of American Railroads' Code of Car Service Rules provides as follows:
>
> > 'Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by necessary data for forwarding and to insure delivery, and accepted by the car inspector of the receiving road. Unless otherwise arranged between the roads concerned the receiving road shall be responsible for the cars, contents and per diem after receipt of the necessary data for forwarding and to insure delivery, and until they have been accepted by its inspector or returned to the delivering road.' "

Title 45, U. S. C. A., § 9, provides, in pertinent parts, as follows:

> "Whenever, as provided in sections 1-7 of this title, any train is operated with power or train brakes * * *; and, to more fully carry into effect the objects of said sections, the Interstate Commerce Commission

> may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid. One hundred and twenty days after the date of enactment of the Power or Train Brakes Safety Appliance Act of 1958, the Interstate Commerce Commission shall adopt and put into effect the rules, standards, and instructions of the Association of American Railroads, * * *, with such revisions as may have been adopted prior to the enactment of such Act, for the installation, inspection, maintenance, and repair of all power or train brakes for common carriers engaged in interstate commerce by railroad. Such rules, standards, and instructions shall thereafter remain the rules, standards and instructions for the installation, inspection, maintenance and repair of all power or train brakes unless changed, after hearing, by order of the Interstate Commerce Commission: **Provided, however,** That such rules or standards or instructions or changes therein shall be promulgated solely for the purpose of achieving safety. * * *."

The word "interchange" as defined by the Interstate Commerce Commission and as attempted to be enforced here does not coincide with the definition of interchange as that term is used in the rules of the Association of American Railroads. To the contrary, the definition given the term "interchange" by the Interstate Commerce Commission is far more restrictive than that given under the rules. The government seeks to enforce the definition of interchange as handed down in a declaratory order entered by the Commission. The facts upon which this declaratory order was entered do not appear. If the definition as rendered by the Interstate Commerce Commission is based upon the definition of interchange as that term is used in the rules of the Association of American

Railroads, then the definition is clearly correct. If, however, there are insufficient facts to establish an interchange as that term is used in the Association of American Railroad rules, then the court cannot say that the definition is valid. That the Interstate Commerce Commission has the power to change the rules cannot be questioned; however, it does not have the power to alter or change rules by interpretation or otherwise, except it first complies with the requirements set forth by Congress. One of the requirements is that the rules, standards, instructions, or changes shall be promulgated solely for the purpose of achieving safety. Without more being shown, it is inconceivable in what manner it is safe for a crew of the New York Central Railroad to replace a crew of the New York Central Railroad and in what manner it would be unsafe for a crew of the New York Central Railroad to be replaced by a crew of the TRRA. If, in fact, upon hearing, it can be established that safety is involved, then the Interstate Commerce Commission under the provisions of the statute has authority to change or alter the rules. It does not otherwise have that power. Here, there has been no hearing, nor has there been a showing that safety is the moving factor.

It is interesting to note that the government states that an interchange did not occur between the TRRA and the Missouri Pacific line, although the Missouri Pacific train crew was replaced by the TRRA crew at the Missouri Pacific Dupo yard and moved over Missouri Pacific rails to the TRRA rails and thence to St. Louis.

The government's charge that an interchange occurred by virtue of a crew change being made at a boundary line between two carriers is not necessarily borne out by the facts, since there is some question as to whether there is a boundary between New York Central and TRRA. This boundary, if it exists, is more fictitious than real, as was

pointed out by the Interstate Commerce Commission in prior rulings.

In 113 I. C. C. 681, at pages 685, 686, the following appears:

> "Before proceeding further it is desirable to state briefly the nature, status, and function of the Association. It is a corporation, the stock of which is owned in equal proportions by 15 of the principal east-side and west-side lines serving the St. Louis-East St. Louis district. The east-side lines hold a majority of the shares. The Association's rails cross the river and it has terminal facilities, including depots and team tracks, in both St. Louis and East St. Louis, where it receives and delivers freight. It holds itself out to perform service for all carriers. Though it is a common carrier, it may not legally operate in all respects as a railroad transportation company, having been perpetually enjoined several years ago from operating otherwise than as a terminal and interchange facility for railroads * * *. The contract between the carriers, by which they may, under the court's decree, continue the Association and the operation of its facilities, contemplates that all carriers shall have equitable treatment in the matter of service, rights, accommodations, benefits, burdens, expenses, charges, etc. Though they do not ordinarily exercise them, the proprietary companies have trackage rights over the Association's line between St. Louis and East St. Louis. Under this contract the properties of the Association represent, in legal and practical effect, the extension of the east-side lines into St. Louis and of the west-side lines into East St. Louis."

The Interstate Commerce Commission also referred to TRRA lines as mere extensions of east-west trackage in

Manufacturers Ry. Co. v. Ahnapee & W. Ry. Co., 172 I. C. C. 554, at 563-4:

> "The proprietary lines of the Terminal have contractual trackage rights to operate their trains over the bridges and tracks owned, leased, or controlled by the Terminal, although none of them exercises such rights for freight service, except the Wabash, * * *. The east-side lines take the position that because of these rights the Terminal is an extension of their rails, and that to grant the relief sought would short haul their lines within the meaning of section 15 (4). They rely upon C., R. I. & P. Ry. Co. v. B. & O. R. R. Co., 113 I. C. C. 681, in which we said that under the trackage contract the properties of the Association (Terminal) represent in legal and practical effect the extension of the east-side lines into St. Louis and of the west-side lines into East St. Louis. * * *."

The mythology of boundary lines, as concerns the TRRA and the road lines, is also considered in Laclede Steel v. Louisville & N. R. Co., 222 I. C. C. 321 at 325, where it is stated:

> "* * *, on traffic of the character here considered, whether originating at the freight station of the Louisville & Nashville in St. Louis, on the rails of the Terminal in St. Louis, or at complainant's plant at Madison, which is moved thence by the Terminal to the Louisville & Nashville interchange point in East St. Louis, the Terminal did not and could not operate as a 'transportation company' for itself, but instead, acted and will continue to act as the '*bona fide* agent and servant' of the Louisville & Nashville. That this is true in actual practice is shown by the testimony of the witness for the Terminal to the effect that whether a shipment originates in St. Louis or at complainant's plant at Madison his company would sign the bill of lading as the agent of the Louisville & Nashville, and

> that the Terminal would act as the impartial agent of the road-haul carrier and not as an independent railroad. * * *. Under such circumstances the conclusion is inescapable that Madison, the intermediate point, is situated **between two points on the same railroad** * * * from which the line-haul rates sought were provided in the applicable tariff. * * *."

The court finds that an interchange did not occur between the New York Central lines and the TRRA lines when a crew change was effected upon the trains reaching the TRRA facilities, as that term is used in 49 CFR 132.12, and, therefore, Terminal Railroad Association is not guilty of violating the provisions of 49 CFR 132.12 with regard to the New York Central and TRRA trains.

The facts surrounding the Missouri Pacific movement from Dupo, Illinois, by the TRRA are as follows: The Missouri Pacific train was made up in Little Rock, Arkansas, and was destined for the Pennsylvania and B. & O. Railroads. At Little Rock the train was given an initial terminal brake test. When the train reached the Missouri Pacific yard at Dupo, the locomotive and caboose were removed and a TRRA locomotive and caboose coupled on. No other change was made in the consist. The train was then moved onto TRRA tracks and delivered to the Pennsylvania and B. & O. Railroads. The brake test required by 49 CFR 132.13 (e) (1) was not made. It is conceded that no interchange occurred between Missouri Pacific and TRRA; rather, the interchange was made directly between Missouri Pacific and the receiving carriers, namely, Pennsylvania or B. & O. The sole question to consider with regard to this movement is whether TRRA complied with the power brake rules when it made the air brake test prescribed by 49 CFR 132.13 (c) (1) or whether it was required to make the test prescribed by 49 CFR 132.13 (e) (1). It was conceded that the (c) (1) test was made

(commonly referred to as the "rear end test"), but that the (e) (1) test (commonly referred to as "walking the train") was not made.

The government argues that the Commission's rules contemplate that every train will receive a brake test when initially assembled and additional tests under certain conditions while the train is still on the line of the railroad making the initial terminal test; that such a condition is described in 132.13 (c) (1); that when the initial terminal test has been made, section 132.13 (c) (1) provides for a lesser test; but that this section does not apply to TRRA on the Missouri Pacific trains, since these trains had not received the initial test on the line of TRRA, and although the Missouri Pacific may have given the trains a proper initial terminal test, defendant TRRA had no knowledge of the condition of the air brakes of these cars.

The government's position is apparently premised on the fact that the TRRA, being a separate entity from the Missouri Pacific, had the absolute duty to make a full complete safety check, notwithstanding the initial terminal test had been made by the Missouri Pacific and notwithstanding the train was received by the TRRA on the Missouri Pacific tracks. The government apparently bases its entire case on the charge that when the locomotive and caboose and crew were changed somehow the complexion of the train changed and this became the initial terminal. It is not contended that this was the initial assembly point, nor could it successfully be so contended, since the consist remained unchanged except for the locomotive and caboose. The defendant argues that the train involved was not a transfer train or a yard train but rather was a Missouri Pacific through freight train and not a transfer train or yard movement as charged by the government.

The facts are sufficient to establish that Missouri Pacific's Dupo yard is not an initial terminal of TRRA. TRRA

does not own any property at Dupo and could not assemble a train there, nor is it charged that the train was assembled by TRRA. The facts firmly establish that the train movement involved was simply a continuation of a Missouri Pacific through train which originated in Little Rock, Arkansas, and was destined for the Pennsylvania and B. & O. Railroads. Nowhere has it been shown that the power brake rules make ownership of the track or the ownership of the locomotive and caboose or the employment of the crew a factor in determining what kind of a test should be made. The government does not contend that an interchange occurred in the Missouri Pacific movement. It specifically states that 132.12 does not apply, even though the train is moved from Missouri Pacific rails onto and across TRRA rails, although it does charge that an interchange occurred when similar conditions were present in the New York Central movements.

The court finds that the test performed by TRRA upon the Missouri Pacific movement, namely, that required by the provisions of 132.13 (c) (1), was adequate and that under the facts as here presented it was not necessary that the TRRA perform the test required by 132.13 (e) (1).

The court finds that defendant TRRA was not guilty of violating the provisions of the Safety Appliance Act with regard to the Missouri Pacific movements.

Parties to settle the order.

(s) William G. Juergens,
Chief Judge.

Dated: May 22, 1967.

APPENDIX B.

In the
United States Court of Appeals
For the Seventh Circuit.

September Term, 1967 — January Session

No. 16497
United States of America,
Plaintiff-Appellant,
v.
Terminal Railroad Association of St. Louis,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois.

July 2, 1968.

Before Castle, Chief Judge, Fairchild and Cummings, Circuit Judges.

Fairchild, Circuit Judge. The United States brought actions against Terminal Railroad Association of St. Louis (TRRA) to recover statutory $250 penalties for failure to comply with ICC regulations requiring inspection of power brakes on trains.[1] Judgment was entered for TRRA and the government appeals.

TRRA is a corporation, the stock of which is owned by several railroads serving the St. Louis gateway from the east and by others serving from the west. It owns a bridge over the Mississippi, and trackage and yards

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[1] 49 C. F. R., secs. 132.12 and 132.13, adopted pursuant to 45 U. S. C., sec. 9.

on both sides of the river, in St. Louis, Missouri, and East St. Louis, Illinois. It is principally a terminal and interchange facility for other railroads. The railroads which own stock have the right to use its tracks.[2]

The parties agreed to treat each of two train movements as representative of several counts. The circumstances are not in dispute. The issue concerns the applicability of the regulations.

The New York Central movement. A train of 60 freight cars, hauled by a New York Central locomotive, and with a New York Central caboose attached, arrived over the New York Central from Indianapolis, at the legal boundary between the New York Central and TRRA tracks in East St. Louis. The New York Central crew left the train, and the TRRA crew boarded. There was no change of locomotive, caboose, or consist. The TRRA crew operated the train over TRRA tracks to Dupo, Illinois, a distance of about nine miles, for delivery to the Missouri Pacific. As far as waybills and accounting records were concerned, the transaction was treated as an interchange directly between New York Central and Missouri Pacific.

The government claims that the delivery of the train by the New York Central crew to the TRRA crew was an interchange within the meaning of sec. 132.12 and that TRRA was accordingly required to make the initial terminal road train air brake test. TRRA denies that this delivery constituted an "interchange", and contends no test was required. Clearly none would have been re-

[2] Descriptions of TRRA at several stages in its long history are found at *United States v. St. Louis Terminal* (1911), 244 U. S. 383; *United States v. St. Louis Terminal* (1915), 236 U. S. 194; *C. R. I. & P. Ry. Co. v. B. & O. R. R. Co.* (1926), 113 ICC 681, 685; *Manufacturers Ry. Co. v. Ahnapee & W. Ry. Co.* (1931), 172 ICC 554, 563; and *Laclede Steel Co. v. Louisville & Nashville R. Co.* (1937), 222 ICC 321, 324.

quired if the New York Central had remained in control of the train and operated it to Dupo.

The Missouri Pacific movement. A train of 123 freight cars, hauled by a Missouri Pacific locomotive, and with a Missouri Pacific caboose attached, arrived, from Little Rock, Arkansas over the Missouri Pacific at the Missouri Pacific yards at Dupo, Illinois. The locomotive and caboose were removed, and a TRRA crew coupled on a TRRA locomotive and caboose. This crew made the type of air brake test required by sec. 132.13 (c) (1) "At a point other than initial terminal where locomotive or caboose is changed. . . ." The train proceeded over TRRA tracks a distance of eight miles to TRRA yard, where the cars were eventually delivered to the B. & O. and Pennsylvania railroads.

The government does not claim that the TRRA received this train in interchange, the alleged difference between this movement and the New York Central movement being the change of locomotive and caboose. It claims that this movement was a transfer train movement, making sec. 132.13 (e) (1) applicable, and that since the movement did not exceed 20 miles the initial terminal road train air brake test, pursuant to sec. 132.13 (e) (2), was not required, but the test prescribed by sec. 132.13 (e) (1) was. One of the differences between the (c) (1) test, actually performed, and the (e) (1) test is that in (c) (1) observation of the application and release of brakes on the rear car would suffice, while in (e) (1) it would be necessary to "walk the train" observing application on each car. The latter observation is one of the requirements of the initial terminal test, required for transfer train movements exceeding 20 miles and for trains received in interchange.

TRRA denies this was a transfer train movement. Had the Missouri Pacific crew remained in control, changed

engine and caboose, and operated the train to the TRRA yard, the only test required would have been the one prescribed by sec. 132.13 (c) (1), and it is conceded this test was made. TRRA contends it was required to do no more.

As to each movement TRRA appears to take the position that for the purpose of air brake inspection requirements the movement by TRRA is to be treated as if performed by New York Central or Missouri Pacific, respectively. It emphasizes its character as a terminal and interchange facility, operating over short distances and at slow speeds, and in many respects having an agency relationship with connecting carriers. The government emphasizes TRRA's legal status as a distinct entity and a common carrier.

TRRA concedes that being a terminal or belt line carrier, or being in an agency status, does not protect it from liability for violation of the safety appliance acts or power brake rules.[3] But it does appear to claim that its status should produce a construction of the rules on inspection so that its duty with respect to the train movements in this case would be the same as the originating carriers' duty if they had performed the movements.

We see no reason for this special approach to construction in the case of inspection requirements. Other provisions of the statutes tend to prevent the use of defective equipment, or use in an improper manner, by making the carrier in immediate control liable for penalty for such use. Any one inspection may not disclose a defective item, but compelling inspections before use will

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[3] See *United States v. Indiana Harbor Belt Railroad Company* (N. D. Ind., 1963), 224 F. Supp. 219, 222; *United States v. Houston Belt & Ter. Ry. Co.* (5th Cir. 1954), 210 F. 2d 421, 425.

tend to disclose and prevent the use of equipment which does not function properly. Treating each carrier which handles a train movement independently, and compelling it to inspect for itself rather than rely on an inspection by a previous carrier is a reasonable means of promoting safety, and appears to be intended by the regulations.

49 C.F.R., sec. 132.12 is entitled "Initial terminal road train air brake tests." Paragraphs (a) to (h) describe the inspection and testing procedures and standards. The opening paragraph provides that this inspection and test must be given "at points: (1) Where a train is originally made up (Initial Terminal); (2) Where train consist is changed other than by adding or removing a solid block of cars and train brake system remains charged (3) Where train is received in interchange." Sec. 132.13(e)(2) requires the same inspection and test for "transfer train and yard train movements exceeding 20 miles." As previously noted, sec. 132.13(e)(1) prescribes a less rigorous test for "transfer train and yard train movements not exceeding 20 miles."

The structure of the opening paragraph of sec. 132.12 strongly suggests an intention that each road train in the possession of any carrier must be given the initial terminal test at the first moment that the train is operated under the control of that particular carrier, *i. e.*, when made up, when radically changed in consist, or when received intact from other carrier. The same test is required for a transfer train operated more than 20 miles, and if there is any exception to the symmetrical plan, it is the transfer train which moves 20 miles or less,

This intention was emphasized by the Interstate Commerce Commission in a declaratory ruling filed with the Federal Register March 26, 1965,[4] about six months before

[4] 30 F. R. 4062.

the train movements involved in this case. Several railroads petitioned for an answer to the following question, among others, and received the following answer:

> "Question: When two railroads join in through train operation without change of power, caboose, or other train consist at their boundary, changing only crews at said boundary, is the boundary the place where the train is received in interchange under 49 CFR 132.12?
>
> "Answer: The boundary between carriers is the place where the train is received in interchange under 49 CFR 132.12 because at that point the use or haul on the line of railroad of the other carrier commences."

In an answer to another question, the commission said:

> ". . . . The clear intent and purpose of 49 CFR 132.12 is to assure full compliance with the power brake requirements of the Safety Appliance Acts. It requires each railroad to discover and repair or reject cars received from other carriers in defective condition, since a carrier may not lawfully haul or use a car with a defective safety appliance, including power brakes, on its line of railroad when the defect had occurred on the line of another carrier."

We conclude that the regulations must be read upon the premise that TRRA is independently responsible for compliance with safety requirements by trains which are on its line and under its control. It is not entitled to treat the movement of those trains as if they had remained in the control of New York Central and Missouri Pacific, and, in effect, to rely upon the initial terminal tests made by those carriers. As will appear, we also conclude that in each instance TRRA was required to

make the type of test required by sec. 132.13(e)(1). It did not do so, and became liable for the statutory penalty on each of the counts of which these train movements were representative.

The government contends that the New York Central movement involved a train received in interchange by TRRA, and that an initial terminal test was required by sec. 132.12. There are two reasons why we do not agree:

(1) The government gives no satisfactory explanation why different provisions apply to the New York Central movement and the Missouri Pacific movement. In both instances a through train had been hauled by the previous carrier. Both were to be hauled less than 20 miles by TRRA. The only difference relied on by the government was that the locomotive and caboose had been changed on the Missouri Pacific movement. If this difference made this train a transfer train and the New York Central a train received in interchange, the regulations achieve an absurd result: A train coming onto the carrier's line intact, with locomotive and caboose, requires a more rigorous test than one on which the locomotive and caboose are changed, though both move less than 20 miles.

(2) TRRA has demonstrated that "interchange" has a special meaning in the railroad industry and that the history of the power brake rules gives sound reason why the word must be construed according to its railroad meaning.

The statutory authority for secs. 132.12 and 132.13 is 45 U. S. C., sec. 9. As amended in 1958, the statute provides that the commission shall adopt the rules of the Association of American Railroads for the inspection (among other things) of railroad power or train brakes.

The so-called Power Brake Rules of A. A. R. were adopted as 49 CFR, secs. 132.10 through .17.

Rule 7 of the association's Car Service Rules provided: "Cars shall be considered as having been delivered to a connecting railroad when placed upon the track agreed upon and designated as the interchange track for such deliveries, accompanied or preceded by necessary data for forwarding to insure delivery, and accepted by the car inspector of the receiving road. . . .."[5] On the basis of Rule 7, it has been said, "Interchange occurs when a car passes from the account of one railroad into the acount of another."[6]

Of course, reflection in accounting records and the transfer of documents which seem to be essential to completion of an interchange under the railroad usage of the term, are not germane, ordinarily, to consideration of physical safety, with which the power brake rules are concerned. There is ambiguity, however, and we think that the soundest construction is that a train which is physically delivered by one carrier to a terminal or belt line carrier, but not treated for accounting purposes as interchanged between the two, is to be deemed a transfer train, for the purposes of sec. 132.13 and given the (e)(1) test if the movement by the terminal or belt line carrier does not exceed 20 miles, and the (e)(2) (initial terminal) test if it does. In so doing we read the provisions of secs. 132.12 and 132.13 together, give effect to the government's position that sec. 132.12 does not cover all inter line movements, but sec. 132.13(e) covers some of them, and recognize the concept that in situations

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[5] Quoted in *Chicago & North Western Ry. Co. v. Chicago, R. I. & P. R. Co.* (N. D. Iowa, 1959), 179 F. Supp. 33, 40.

[6] *Southern Railway Co. v. Louisville and Nashville R. Co.* (W. D. Ky. 1960), 185 F. Supp. 645, 651, aff'd (6th Cir. 1961), 289 F. 2d 934.

like the New York Central movement the interchange, in the railroad sense, is between the trunk line carriers.

The judgment is reversed and the cause remanded with directions to enter judgment for plaintiff, consistent with this opinion.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C.

Statute Involved.

45 U. S. C., § 9. Power or train brakes; operation by engineer; rules for installation, inspection, maintenance, and repair.

Whenever, as provided in sections 1-7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said sections, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid. One hundred and twenty days after the date of enactment of the Power or Train Brakes Safety Appliance Act of 1958, the Interstate Commerce Commission shall adopt and put into effect the rules, standards and instructions of the Association of American Railroads, adopted in 1925 and revised in 1933, 1934, 1941, and 1953, with such revisions as may have been adopted prior to the enactment of such Act, for the installation, inspection, maintenance, and repair of all power or train brakes for common carriers engaged in interstate commerce by railroad. Such rules, standards, and instructions shall thereafter remain the rules, standards, and instructions for the installation, inspection, maintenance, and repair of all power or train brakes unless changed, after hearing, by order of the Interstate Commerce Commission: *Provided, however,* That such

rules or standards or instructions or changes therein shall be promulgated solely for the purpose of achieving safety. The provisions and requirements of this section shall apply to all trains, locomotives, tenders, cars and similar vehicles used, hauled, or permitted to be used or hauled, by any railroad engaged in interstate commerce. In the execution of this section, the Interstate Commerce Commission may utilize the services of the Association of American Railroads, and may avail itself of the advice and assistance of any department, commission, or board of the United States Government, and of State governments, but no official or employee of the United States shall receive any additional compensation for such service except as now permitted by law. Failure to comply with any rule, regulation, or requirement promulgated by the Interstate Commerce Commission pursuant to the provisions of this section shall be subject to the like penalty as failure to comply with any requirement of this section.

APPENDIX D.

49 C. F. R., Sec. 132.12. Initial Terminal road train air brake tests. All trains must be given inspection and test as specified by paragraphs (a) to (h) of this section at points: (1) Where a train is originally made up (Initial Terminal); (2) Where train consist is changed other than by adding or removing a solid block of cars and train brake system remains charged; (3) Where train is received in interchange. Each carrier shall establish designated intermediate inspection points within a limit of not to exceed 500 miles where additional inspection will be made to determine that (1) Brake pipe leakage does not exceed 5 pounds per minute; (2) Brakes apply on each car from a 20 pound service brake pipe reduction; (3) That brake rigging is properly secured and does not bind or foul.

* * * * * * *

49 C. F. R., Sec. 132.13. Road train and intermediate terminal train air brake tests. * * *

(c) (1) At a point other than initial terminal where locomotive or caboose is changed, or where one or more consecutive cars are cut off from rear end or head end of train with consist otherwise remaining intact, after train brake system is charged to within 15 pounds of feed valve setting on locomotive but not less than 60 pounds as indicated at rear of freight train, and on a passenger train to at least 70 pounds, a 20 pound brake pipe reduction must be made and it must be determined that brakes on rear car apply and release properly.

* * * * * * *

(e) (1) Transfer train and yard train movements not exceeding 20 miles, must have the air brake hose coupled between all cars, and after the brake system is charged to not less than 60 pounds, a 15 pound service brake pipe reduction must be made to determine that the brakes are applied on each car before releasing and proceeding.

* * * * * * *

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No. 545

In the Supreme Court of the United States

OCTOBER TERM, 1968

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 25–33) is reported at 397 F. 2d 467.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1968. The petition for a writ of certiorari was filed on September 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly construed and applied regulations adopted under the Safety

323-609—68

Appliance Acts (45 U.S.C. 9) in determining the type of brake inspections required of certain trains passing under petitioner's control.

STATEMENT

In 1958 Congress amended the Safety Appliance Act by enacting the Power or Train Brakes Safety Appliance Act, which empowered the Interstate Commerce Commission to adopt rules for the inspection of all power or train brakes on rail carriers. 45 U.S.C. 9 (Pet. App. 34–35). Pursuant to that authority, the Commission adopted regulations which provide for three distinct train brake inspections applicable in different circumstances. Under these regulations, the most stringent brake inspection test is applicable, *inter alia,* when a train is originally made up, when it is received in interchange, and with respect to "[t]ransfer train and yard train movements" in excess of 20 miles (49 C.F.R. 132.13(e)(2)).[1] An intermediate test, known as the "walk the train test" (see Pet. App. 23), applies to "[t]ransfer train and yard train movements" of less than 20 miles. 49 C.F.R. 132.13(e)(1) (Pet. App. 36). The least stringent inspection, commonly called the "rear end test," applies at the point where the locomotive or caboose is changed or where consecutive cars are cut off the

[1] The regulations at issue, set forth in pertinent part at Pet. App. 36, were redesignated 49 C.F.R. 232.12 and 49 C.F.R. 232.13 on April 5, 1967. Because the former designations, 49 C.F.R. 132.12 and 132.13, were used by the court below and in the petition, they are also used herein for the convenience of the Court.

rear end or front end of a train with the consist otherwise remaining intact. 49 C.F.R. 132.13(c)(1) (Pet. App. 36). Each of the two more stringent regulations requires a visual inspection to determine that the brakes are properly applied on all the cars, while the least stringent test requires only a determination that the brakes of the rear car are properly applied.

The instant case arose out of three suits for statutory penalties filed in the United States District Court for the Eastern District of Illinois, in which the United States charged petitioner corporation with the operation of trains without making the proper brake inspections required by the applicable regulations. Petitioner is a terminal line carrier which operates a terminal and interchange facility for other railroads in the St. Louis area, where it owns railroad tracks and yards on both sides of the Mississippi river. It was agreed below that the following two movements under petitioner's control were representative of all those at issue.

1. The New York Central Train Movement

The New York Central Railroad delivered a freight train, originating in Indianapolis, to petitioner at the latter's tracks in East St. Louis. Petitioner's crew replaced the New York Central crew and operated the entire train without any change in consist to Dupo, Illinois, a distance of nine miles, where it delivered the train to another railroad. Petitioner performed no brake test of any kind.

2. The Missouri Pacific Train Movement

The Missouri Pacific Railroad made up a train at Little Rock, Arkansas which it hauled to Dupo, Illinois. There, the locomotive and caboose were removed and a locomotive and caboose of petitioner were coupled on by petitioner's crew. This crew inspected the brakes on the rear car and made the least stringent test required by the regulation (49 C.F.R. 132.13(c)(1)). Petitioner's crew then operated this train over its lines for a distance of eight miles where it delivered it to another carrier.

The district court found that petitioner had not violated any of the brake testing regulations. The court of appeals reversed and remanded with directions to enter judgment for the United States. It held that both train movements were "transfer train" movements subject to the intermediate inspection regulation, requiring visual inspection of the brakes on each car. It rejected petitioner's argument that the obligation to inspect the brakes was not affected by its assumption of control of the train from the trunk line carrier. It also rejected the government's contention that the receipt of the intact New York Central trains by petitioner constituted an "interchange" subjecting the trains to the most stringent inspection.

ARGUMENT

The overall objective of the Safety Appliance Acts, as the 1958 Amendment relating to brake inspection involved in this case re-emphasizes (see Pet. App. 34–35), is to protect railroad employees and the public from injury caused by defective railroad equip-

ment. Indeed, in carrying out the statutory purpose each carrier, including a terminal carrier, has an absolute duty to refrain from hauling defective cars. *United States* v. *Houston Belt and Terminal Ry. Co.*, 210 F. 2d 421, 425 (C.A. 5). In holding that petitioner, by taking control of the trains involved in this case, was obligated to make a visual inspection of the brakes on each car, the court of appeals adopted a logical and symmetrical interpretation of the brake testing regulations in keeping with the underlying statutory purpose.

1. While holding that the control exercised by petitioner did not have all the attributes of an "interchange" thereby automatically requiring the most stringent brake inspection under 49 C.F.R. 132.12, the court of appeals also rejected the argument that petitioner's assumption of control of the trains had no bearing at all upon its inspection responsibilities. It thereby avoided the result—both faulty in logic and inimical to considerations of safety—that despite substantial similarity in petitioner's control no inspection was required in one case of transfer and minimal inspection was required in another. Instead, the court reasoned that "[t]reating each carrier which handles a train movement independently, and compelling it to inspect for itself rather than rely on an inspection by a previous carrier is a reasonable means of promoting safety, and appears to be intended by the regulations" (Pet. App. 29),[2] and that petitioner

[2] As this Court noted in *United States* v. *Seaboard A.L.R. Co.*, 361 U.S. 78, 82: "Traditionally, movements of assembled

should therefore be held independently responsible "for compliance with safety requirements by trains which are on its line and under its control" (Pet. App. 30). In other words, the court ruled that upon taking custody and control of a train, a terminal line carrier, such as petitioner, has at least the minimum duty to make sure that the brakes of each car of the train work properly (see 49 C.F.R. 132.13(e)(1)).

2. Petitioner argues (Pet. 9–11), however, that in order to reach this conclusion the court of appeals had to treat the train movements in this case as "transfer train" movements, contrary to decisions of this Court. This contention reads unintended consequences into those decisions. The decisions relied upon by petitioner were discussed in *United States* v. *Seaboard A.L.R. Co.*, 361 U.S. 78, 80–81, where this Court noted that each case was concerned with the distinction between movement of a "train" which falls within the Safety Appliance Acts and other movements such as switching operations which fall outside the statutory coverage. The issue was "[t]he meaning of the word 'train' as used in the Act * * *" (361 U.S. at 80). Nothing in those decisions, or in the decisions of the lower courts upon which petitioner relies, purported to set forth an immutable definition of "transfer train" for all factual contexts. Least of all do those decisions support petitioner's contention that its movement of what is admittedly a "train" cannot be con-

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cars for substantial distances involved the hazards of crossing public highways and the tracks of other lines with attendant risks to the public." Moreover, it is settled that control of a train by a carrier imposes an absolute duty of care. *Brady* v. *Terminal R.R. Assn.*, 303 U.S. 10.

sidered a "transfer train" movement because that concept is limited to "the transfer of temporary groupings of cars * * *" (Pet. 11). There is thus no barrier to the interpretation of the regulations made by the court below, that a transfer train includes "a train which is physically delivered by one carrier to a terminal or belt line carrier * * *" (Pet. App. 32)—an interpretation which serves the underlying safety purpose of the statute and regulations.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1968.